No. 06-1692

In The

Supreme Court of the United States

PAUL KLEIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Ninth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

DAVID Z. CHESNOFF
Counsel of Record
RICHARD A. SCHONFELD
CHESNOFF & SCHONFELD
520 South Fourth Street
Las Vegas, Nevada 89101
(702) 384-5563
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

I.

QUESTION PRESENTED FOR REVIEW

A. CAN A WARRANTLESS SEARCH BE UPHELD WHEN IT IS PERFORMED PURSUANT TO A CONDITION OF PROBATION WHICH WAS AN ILLEGAL AND VOID SENTENCE?

II.

PARTIES TO THE PROCEEDING

There are no parties to this proceeding other than those listed in the caption

TABLE OF CONTENTS

		Page
I.	QUESTION PRESENTED FOR REVIEW	i
II.	PARTIES TO THE PROCEEDING	ii
III.	OPINION BELOW	1
IV.	BASIS FOR JURISDICTION	1
V.	CONSTITUTIONAL PROVISION INVOLVED	1
VI.	STATEMENT OF THE CASE	1
	A. PROCEDURAL HISTORY	1
	B. STATEMENT OF FACTS	2
	C. TESTIMONY AT THE SUPPRESSION HEARING	5
	1. Dale Russell Ellis	5
	2. Joseph Perez	6
	3. Todd Fredlund	8
	4. Paul Klein	8
	D. NINTH CIRCUIT COURT OF APPEALS' OPINION	9
VII.	REASONS WHY THE WRIT SHOULD ISSUE	11
	A. THIS HONORABLE COURT SHOULD GRANT THE WRIT IN ORDER TO CORRECT THE SPLIT IN THE CIRCUITS, VACATE THE NINTH CIRCUIT'S DECISION AND REMAND THE MATTER WITH INSTRUCTIONS THAT KLEIN'S PREVIOUSLY IMPOSED SENTENCE WAS ILLEGAL AND VOID AND THE EVIDENCE SEIZED AS A RESULT OF THAT SENTENCE BE SUPPRESSED	11

TABLE OF CONTENTS – Continued

Page

B. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ERRED IN UPHOLDING THE WARRANTLESS SEARCH THAT WAS PERFORMED PURSUANT TO A CONDITION OF KLEIN'S ILLEGAL AND VOID SENTENCE 11

1. The District Court in the Central District of California Lacked Jurisdiction to "Correct" Klein's Sentence on May 7, 2002 11

2. Inter-Circuit Conflict 14

VIII. CONCLUSION 15

APPENDIX INDEX ..... App. i

TABLE OF AUTHORITIES

Page

CASES

Custis v. United States, 511 U.S. 485 (1994) 10

United States v. Aguirre, 214 F.3d 1122 (9th Cir. 2000) 13

United States v. Martinez-Martinez, 295 F.3d 1041 (9th Cir. 2002) 10

United States v. Penna, 319 F.3d 509 (9th Cir. 2003) 13

United States v. Thomas, 135 F.3d 873 (2nd Cir. 1998) 10, 11, 13, 14

United States v. Vega, 241 F.3d 910 (7th Cir. 2001) 13

United States v. Wisch, 275 F.3d 620 (7th Cir. 2001) 13

FEDERAL STATUTES

18 U.S.C. § 3583(a) 12

28 U.S.C. § 1254 1

U.S.S.G. § 5D1.1 12

FEDERAL RULES

Federal Rules of Criminal Procedure, Rule 35 ..... 12, 13, 14

Federal Rules of Criminal Procedure, Rule 36 14

SUP. CT. R. 10(a) 11

III.

OPINION BELOW

The unpublished Memorandum of United States Court of Appeals for the Ninth Circuit is entitled *United States v. Klein*, and is reproduced in Appendix (App.) A.

IV.

BASIS FOR JURISDICTION

The United States Court of Appeals for the Ninth Circuit filed its decision on April 20, 2007. *See* App. A.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

V.

CONSTITUTIONAL PROVISION INVOLVED

This appeal involves the Fourth Amendment and the Due Process Clause of the United States Constitution.

VI.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Petitioner was charged by way of Indictment filed on May 25, 2004, with Possession of Machine Guns (Count One); Unlawful Possession of a Firearm Silencer (Count Two); Possession of a Non-Registered Firearm (Count Three); and Felon in Possession of a Firearm (Count Four). Petitioner ultimately pled guilty to Counts One and Four.

On August 25, 2004, Petitioner filed his Motion to Suppress Evidence. The government filed their Opposition on or about September 14, 2004. Petitioner filed his Reply on September 22, 2004. An evidentiary hearing was conducted on April 11, 2005.

At the conclusion of the evidentiary hearing the Honorable Magistrate Judge took the matter under advisement. Thereafter, on May 22, 2005, the Magistrate entered her Report and Recommendation denying the Motion to Suppress. Petitioner filed a timely Objection to the Report and Recommendation. The government filed their Opposition. On June 7, 2005, the District Court entered its Order Denying the Motion to Suppress Evidence.

Thereafter, the Petitioner entered his guilty plea and specifically reserved his right to appeal the denial of his Motion to Suppress. Petitioner was sentenced on December 19, 2005. Petitioner filed a timely Notice of Appeal. On April 20, 2007, the United States Court of Appeals for the Ninth Circuit filed its Memorandum decision affirming the District Court's ruling.

B. STATEMENT OF THE FACTS

On March 4, 2002, Petitioner herein, Paul Klein, was sentenced in the District Court for the Central District of California for possessing counterfeit currency. *United States v. Paul Richard Klein*, Central District of California case number 00-1181-WJR. At the time of his sentencing in California, Klein was forced to represent himself. He had previously been represented by counsel, William Dougherty of Villa Park, California. Mr. Dougherty died in December 2001. Klein was never appointed new counsel, even when brought into Court.

At the sentencing hearing, the district court imposed a sentence of four months in a home detention program followed by three years of supervised release. *See* App. B. The conditions of supervised release did not include a search condition. Following sentencing, no appeal was taken as Klein had waived his right to appeal.

Several months after the sentencing, the government approached Klein, who was still without counsel, about "correcting" his sentence. On May 3, 2002, Klein signed a stipulation prepared by the government. That stipulation was captioned: "Stipulation Re: Correction of Judgment and Probation/Commitment Order." *See* App. C.

The stipulation stated that Klein's sentence would be changed from one imposing a period of imprisonment followed by supervised release to a sentence of probation which included home detention as a condition of probation. The stipulation claimed that at Klein's sentencing on March 4, 2002, "the Court inadvertently stated that it sentenced defendant to three years 'supervised release' with four months of home detention, rather than stating that it sentenced defendant to three years probation with a special condition of four months of home detention." The order "correcting" the sentence was signed by the district court and filed on May 7, 2002. The order "correcting" the sentence did not alter any of the other conditions imposed as part of the previously ordered three-year period of supervised release.

Prior to Klein's illegal sentence being "corrected" he had already moved to Nevada.

When Klein met with his Nevada probation officer, Rusty Ellis, the probation officer noticed that Klein did not have a search condition among his conditions of probation.

The probation officer demanded that a search condition be added to Klein's conditions of probation. The probation officer demanded that Klein sign a waiver making a search of his residence and vehicle without a warrant a condition of his probation or the probation officer would force Klein to go to court where the condition would be imposed anyway. The probation officer said to Klein that he either sign the waiver "or I'll take you to court, make you sign it, and we'll be off on a bad foot, is that what you want?" Moreover, the officer stated that Klein's transfer to Nevada could be denied. Feeling threatened and coerced, Klein signed the waiver.

Klein's probation was fairly routine for the first year. Klein started and ran a business, Vegas Auto Sound. His probation officers did a number of "home visits" at Klein's residence without incident. Then in May, 2003, Joseph Perez became his probation officer.

On July 8, 2003, Perez, who was accompanied by a second probation officer, Todd Fredlund, conducted a home visit on Petitioner. At that time they saw a ceremonial sword in Klein's bedroom. Perez said he was going to seize the sword. Perez and Fredlund then began to search through several drawers in Klein's bedroom. This search eventually lead to the discovery of three firearms. Klein was placed under arrest. The next day, ATF agents obtained a search warrant for Klein's residence based entirely on the findings made by Perez and Fredlund the day before. When this warrant was executed several more weapons were located and seized.

The Indictment filed against Petitioner was based upon the weapons seized at his residence by Perez and Fredlund on July 8th and by ATF agents on July 9, 2003.

C. TESTIMONY AT SUPPRESSION HEARING

1. Dale Russell Ellis

Mr. Ellis is a probation officer in the District of Nevada. He was first assigned to supervise Petitioner in March of 2002. Petitioner had requested a transfer of his Probation from the Central District of California to Nevada. Petitioner was already residing in Nevada.

In April of 2002, Petitioner visited this probation officer at his office. They went over Petitioner's conditions of supervision. At that time the probation officer asked Petitioner to sign a waiver adding a search condition to his supervision. The officer testified that "We always request a search condition no matter who it is coming from whatever district coming here," . . . "In our district, we require a search condition." The officer had no specific memory of the conversation with Petitioner. The officer testified that if the individual signs the waiver it is sent over to the Judge who will include it as part of their special conditions. If the individual does not sign the waiver, then they will take the matter to Court and request that a search condition be added. The other option, when the individual refuses to sign, is denial of the transfer from California to Nevada. The Officer testified that in the past, refusal to sign the authorization to search has resulted in the denial of transfer from other districts.

This officer recognized that the court order from the Central District of California did not contain a search clause. He further recognized that the Honorable Judge Rae, who was familiar with Petitioner's case, had evaluated the appropriate sentence for Petitioner. The Honorable Judge Rae explicitly left out a clause permitting warrantless searches of Petitioner.

On April 4, 2002, the day that Petitioner signed the waiver, the officer admitted that he *did not ask Petitioner if he wanted to consult with a lawyer prior to signing the waiver*. The officer further testified that although he did not have a specific recollection of the events in question, it is quite possible that he informed Petitioner that he would not be permitted to remain in Nevada if he did not have a search clause. The Officer testified that Petitioner was anxious to remain in Nevada, as he had a business, with employees, that was operating in Nevada.

The officer testified that he did not explain to Petitioner the process of a 32.1 hearing; however, he admitted that the statute requires a hearing with the assistance of counsel prior to making this type of change in Petitioner's conditions of release.

This officer testified that Petitioner's supervision was formally transferred to Nevada at a point in time after the search clause was added as a condition of supervision by the Nevada Court.

It should be further noted that the Waiver was signed on April 4, 2002, and Klein's sentence was "corrected" on May 7, 2002. Accordingly, the search clause was added as a condition of the illegal sentence of supervised release. Furthermore, this additional condition was added prior to the District Court in the Central District of California "correcting" the judgment. The "corrected" judgment did not adopt the search clause.

2. Joseph Perez

This witness was Petitioner's Probation Officer on July 8, 2003. On July 8, 2003, he met with Petitioner at

his residence. He was accompanied by Officer Fredlund. The officers entered Petitioner's home. This officer advised Petitioner that he "needed a tour" of the residence.

As this officer entered Petitioner's room he saw a sword against the wall between the bed and the night-stand. The officer advised Petitioner that he was not supposed to have any dangerous weapons. The officer secured the sword. The officer asked Petitioner to show him the closet. The officer did not discover anything improper within the closet. At that time the two officers and Mr. Klein were all standing within the bedroom. Officer Perez asked Petitioner if he had any other weapons, to which Petitioner did not respond. Although Klein made no movement or gestures, Perez then reached to his immediate left "where there was a dresser, and I pulled open a random drawer because of his mannerisms." The dresser had several drawers; however, only one was opened at that time. The drawer was approximately four feet away from Petitioner. The officer described the drawer as a "junk drawer." This officer testified that officer Fredlund then opened a drawer to the dresser that was directly by him. Again, that dresser had several drawers and only one was opened at that time. That officer found a loaded gun magazine.

The officer escorted Klein out of the room while officer Fredlund watched Klein. This officer then went back into the bedroom and "conducted a limited search of the area." Petitioner was not in the bedroom at that time. The officer found three different weapons. The weapons were located underneath the bed. Klein and his girlfriend were *then* placed in restraints.

3. Todd Fredlund

This witness is a probation officer, and he accompanied Officer Perez to Petitioner's home on July 8, 2003. Officer Perez wanted a walk through of the home and directed Petitioner to show them his bedroom. As soon as they made entry into the room the officer observed a sword situated between the bed and the nightstand.

Mr. Perez advised Petitioner that it was a dangerous weapon and inquired if there were any other weapons in the residence. Klein did not answer the question. Officer Perez then randomly opened a dresser drawer near where he was standing. The officer found a high capacity magazine with ammunition in the drawer. The drawer was approximately five feet away from Petitioner.

At that time the officers escorted Petitioner out of the bedroom. Officer Perez went back into the bedroom. Perez later came out of the bedroom and placed Petitioner in handcuffs. Perez then went back into the bedroom again.

4. Paul Klein

Mr. Klein testified that he started a business in Las Vegas called Vegas Auto Sound. The business license was obtained on September 11, 2001.

Prior to moving to Las Vegas, Mr. Klein was charged in the Central District of California with Money Laundering. Mr. Klein entered into a plea agreement with the United States and agreed to cooperate with their investigation. Mr. Klein did in fact cooperate with the government and received a 5K.1 departure. There were people prosecuted as a result of Mr. Klein's cooperation. Those people resided in California. Accordingly, after Mr. Klein's

sentence was imposed, it was his desire to leave California. Mr. Klein testified that the people that he assisted the government with prosecuting learned of his cooperation "almost immediately," and he then received death threats. Klein had an agreement with the prosecution and the Court that his supervised release would be transferred to Nevada. Accordingly, Mr. Klein moved to Nevada and began a business.

At the time of Mr. Klein's sentencing he did not have counsel. His attorney had passed away. The same is true when Mr. Klein met with his probation officer in Las Vegas in April of 2002. Paul met with Rusty Ellis and was asked to sign a waiver of search clause. Paul was told that the waiver was required if he wanted to move to Nevada. The officer advised Petitioner to "either sign it or I'll take you to court and make you sign it, and we'll be off on the bad foot, and you won't be allowed to be in Nevada. Is that what you want?" *Petitioner had no lawyer, was not offered the opportunity to contact a lawyer, nor was he offered a federal public defender.* Petitioner felt that he had no choice, but to sign the waiver. Petitioner testified that he attempted to write "signed under duress" on the form; however, the officer made him sign a fresh form.

D. THE NINTH CIRCUIT COURT OF APPEALS' OPINION

Klein raised a number of issues on appeal. The court denied all of Klein's issue pertaining to the illegal search that was executed in Klein's home. *See United States v. Klein*, App. A. Of moment to this appeal, is the split in the Circuits' view related to enforcement of conditions of an illegal sentence of supervised release. The United States

Court of Appeals for the Second Circuit has recognized that conditions of an illegal and void sentence of supervised release cannot be enforced. *United States v. Thomas*, 135 F.3d 873 (2nd Cir. 1998). The United States Court of Appeals for the Ninth Circuit upheld the search in this case which was performed as a result of Klein's illegal and void sentence. The Ninth Circuit relied upon the holding in *Custis v. United States*, 511 U.S. 485, 490-97 (1994) and *United States v. Martinez-Martinez*, 295 F.3d 1041, 1044 (9th Cir. 2002) and viewed Klein's motion as a collateral attack on his California conviction. Those two cases are both factually and legally distinguishable from this case. Those cases address the impropriety of collateral attacks on prior convictions that are being utilized for sentencing enhancements. To the contrary, the instant case deals with the fact that Klein's prior conviction could not be utilized as the basis or justification for the illegal and warrantless search performed by the government agents.

Petitioner is litigating the propriety of a search and not the propriety of his California conviction. Had the district court herein agreed that the search was a violation of the Fourth Amendment, because Appellant was not properly on supervision at the time of the search, the Court would not be entering an order invalidating Klein's prior conviction, it would be entering an order suppressing the evidence.

This Petition follows.

VII.

REASONS WHY THE WRIT SHOULD ISSUE

A. THIS HONORABLE COURT SHOULD GRANT THE WRIT IN ORDER TO CORRECT THE SPLIT IN THE CIRCUITS, VACATE THE NINTH CIRCUIT'S DECISION AND REMAND THE MATTER WITH INSTRUCTIONS THAT KLEIN'S PREVIOUSLY IMPOSED SENTENCE WAS ILLEGAL AND VOID AND THE EVIDENCE SEIZED AS A RESULT OF THAT SENTENCE BE SUPPRESSED

This Court should grant this Writ because there is a split in the circuits. The Second Circuit Court of Appeals in *U.S. v. Thomas*, 135 F.3d 873 (2nd Cir. 1998), ruled in favor of the defendant therein on the same issue. The United States Court of Appeals for the Ninth Circuit Court ruled against Petitioner herein. The decision in *United States v. Klein*, 06-10033 (9th Cir. 2007) is in conflict with the decision in *United Sates v. Thomas*, *supra*, and accordingly, this Honorable Court should address the inter-circuit conflict. *See* SUP. CT. RULE 10(a).

B. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ERRED IN UPHOLDING THE WARRANTLESS SEARCH THAT WAS PERFORMED PURSUANT TO A CONDITION OF KLEIN'S ILLEGAL AND VOID SENTENCE

1. The District Court in the Central District of California Lacked Jurisdiction To "Correct" Klein's Sentence on May 7, 2002

The District Court for the Central District of California sentenced Klein on March 4, 2002. At that sentencing

hearing, the court imposed a sentence of home detention to be followed by three years of supervised release. On May 7, 2003, two months after the sentencing, the district court issued an order "correcting" that sentence. The court changed Klein's sentence from three years of supervised release to three years of probation.

The sentence of supervised release was in and of itself an illegal sentence. It is clear that supervised release can never be imposed without an initial period of imprisonment. *See* 18 U.S.C. § 3583(a) ("The court . . . may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release *after imprisonment*. . . .") (emphasis added); U.S.S.G. § 5D1.1 ("The court shall order a term of supervised release *to follow imprisonment* when a sentence of imprisonment of more than one year is imposed, or when required by statute," and "may order a term of supervised release *to follow imprisonment* in any other case.") (emphasis added). The plain language of § 3583(a) and U.S.S.G. § 5D1.1 compels the conclusion that supervised release presupposes a period of imprisonment. It follows that, for this reason too, the original sentence was in violation of law.

Additionally, the May 7, 2002, "correction" was also illegal. It is black letter law that the district court lacked jurisdiction to "correct" Klein's sentence on May 7, 2002, two months after he was sentenced.

Rule 35(a) provides the only means by which a district court can "correct" a sentence.[1] Rule 35(a) states that the court "within 7 days after sentencing, may correct a

[1] Rule 36 provides that a court may correct "clerical mistakes" at any time. At issue here is not a "clerical mistake."

sentence that resulted from arithmetical, technical, or other clear error."[2] Rule 35 is jurisdictional. "The district court must correct a sentence within seven days after orally pronouncing it *or else it loses its jurisdiction to modify the sentence*." *United States v. Penna*, 319 F.3d 509, 512 (9th Cir. 2003) (emphasis in original), citing *United States v. Aguirre*, 214 F.3d 1122, 1123 (9th Cir. 2000). *See also United States v. Wisch*, 275 F.3d 620, 626 (7th Cir. 2001): "The time limit is jurisdictional, *United States v. Vega*, 241 F.3d 910, 911-912 (7th Cir. 2001), and furthermore, the motion must be *ruled on* by the district court within seven days, not simply *filed with* the clerk of the court during that time." (Emphasis in original.) *Penna* makes it absolutely clear that where a court without jurisdiction illegally "corrects" a sentence, the "corrected sentence" is null and void. *See also United States v. Thomas, supra.*

Since no search condition was ever made a condition of Klein's supervised release by the Court, and since Klein's sentence and "corrected" sentence were illegal, the warrantless search conducted by Perez and Fredlund on July 8, 2003 was unlawful.

Additionally, assuming arguendo that the "correction" to Klein's sentence was valid, the search clause that was added by Officer Ellis in April of 2002, was not adopted by the United States District Court for the Central District when it "corrected" Klein's Judgment in May of 2002. Accordingly, there was never a valid search clause and all

---

[2] The same language was substantially set forth in Rule 35(c) prior to December 1, 2002 when Rule 35 was amended.

evidence seized by Perez and Fredlund must be suppressed.

This exact issue was addressed by the United States Court of Appeals for the Second Circuit in *U.S. v. Thomas*, 135 F.3d 873 (2nd Cir. 1998). Therein, the defendant was sentenced to a period of home detention to be followed by supervised release. Thereafter, the Court modified the sentence to be a period of probation with the home confinement as a condition of said probation. *Id.* at 874. The defendant ultimately violated the conditions of her "probation" and was sentenced to nine months of community confinement. *Id.* The defendant appealed and the United States Court of Appeals for the Second Circuit held that district court's modifications were not permissible under Federal Rules of Criminal Procedure 35(c) and 36, as the district court corrected the sentence from a non-clerical error beyond the seven day time limitation. *Id.* at 875. The Court held that the amended sentence was "imposed in violation of law." *Id.* at 876. Finally, the Court concluded that there could be no violation of probation that was illegally imposed by the void sentence. *Id.*

The same is true for Petitioner herein. Petitioner was neither on supervised release nor probation at the time of the warrantless search, and therefore the evidence seized should have been suppressed, since the probation officers had no authority to search.

2. Inter-Circuit Conflict

In deciding that the evidence seized at Petitioner's home was admissible evidence, the United States Court of Appeals for the Ninth Circuit Court has created a divergence in federal criminal jurisprudence.

VIII.

CONCLUSION

The Petitioner's home was illegally searched as a result of a void and illegal sentence. Had Petitioner's case been pending within the United States Court of Appeals for the Second Circuit, the evidence would have been suppressed. Accordingly, there is a split in the circuits and Certiorari is warranted herein.

Dated this 15 day of June, 2007.

Respectfully submitted,

DAVID Z. CHESNOFF
Counsel of Record
RICHARD A. SCHONFELD
CHESNOFF & SCHONFELD
520 South Fourth Street
Las Vegas, Nevada 89101
(702) 384-5563
Counsel for Petitioner